Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

ESTATE OF KATHERINE HUTCHINSON, ESTATE OF CHRISTIE HUTCHINSON, and ESTATE OF TIFFANY HUTCHINSON, all by GERALD HUTCHINSON, PERSONAL REPRESENTATIVE,

Petitioners,

v.

STATE OF MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where Gerald Hutchinson's entire family was killed due to policies, practices and customs of the defendant Department of Environmental Quality ("DEQ"), a Michigan state agency, which led the DEQ to dredge a boat channel through the swimming area at a public park, through willful, wanton, criminal conduct, shocking to the conscience, in violation of various civil and criminal statutes, and which resulted in the drowning deaths of Katherine Hutchinson and her two young daughters, Tiffany, age 9, and Christie, age 11; and where the Michigan Court of Appeals, to protect the state treasury, made a clear error of law, finding that Plaintiff Estates had no justiciable claim under the substantive due process clause of the Fourteenth Amendment to the United States Constitution, because decedents had no constitutional right to a safe beach, which was the only deprivation the Court of Appeals posited as a consequence of defendant's shocking conduct; and where Petitioner's decedents were in fact deprived of their very lives, a deprivation specifically mentioned in the Fourteenth Amendment; and where the Michigan Supreme Court avoided the entire controversy by denying discretionary review, allowing the erroneous holding by the Court of Appeals to stand, despite the fact that the Court of Appeals' analysis constitutes a plain error of law that would read the Fourteenth Amendment's guarantee of substantive due process completely out of the Constitution as applied in the State of Michigan; should the United States Supreme Court issue a writ of certiorari, or in the alternative, grant summary relief on Petitioners' application pursuant to Supreme Court Rule 16.1?

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TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT:

Petitioners respectfully pray that a Writ of Certiorari issue, or that summary relief be granted pursuant to Supreme Court Rule 16.1, to review the Judgment of the Michigan Court of Appeals entered in the above-titled case on January 12, 2001.

OPINIONS BELOW

The Orders of the Michigan Court of Claims are unreported and are printed in the Appendix hereto at pages 15a-20a, *infra*. The Opinion of the Michigan Court of Appeals dated Jan. 12, 2001 is unreported and is printed in the Appendix hereto at pages 1a-14a, *infra*. The Order of the Michigan Court of Appeals Denying Rehearing, dated Mar. 22, 2001, is unreported and is printed in the Appendix hereto at page 21a, *infra*. The Order of the Michigan Supreme Court Denying Leave To Appeal, dated April 29, 2002, is unreported and is printed in the Appendix hereto at pages 22a-23a, *infra*.

STATEMENT OF JURISDICTION

The final judgment of the Michigan Court of Appeals was entered January 12, 2001, and Petitioner Estates filed a timely Petition for Rehearing. That petition was denied by the Michigan Court of Appeals on March 22, 2001, and Petitioner Estates filed a timely application for discretionary review with the Michigan Supreme Court, the highest state court. The Michigan Supreme Court denied review by order dated April 29, 2002. Jurisdiction was invoked in the Michigan Court of Claims under Michigan statute, MCLA 600.6419; in the Michigan Court of Appeals under MCLA 600.308; and in the Michigan Supreme Court under MCLA 600.309 and Michigan Court Rule (MCR)

7.301. Jurisdiction in the United States Supreme Court is invoked under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The facts set forth below are taken from plaintiff's complaint (Appendix A).[1] Until the death of his wife and daughters, Plaintiff Gerald Hutchinson and his family resided in Luce County, Michigan. Defendant Michigan Department of Environmental Quality, f/k/a Department of Natural Resources ("DEQ") is an agency of state government.

There is a public park in Portage Township, Mackinac County, Michigan commonly known as Portage Township Park, which is owned by Defendant DEQ but leased to Portage Township. The Park is located on the shore of an inland lake under the jurisdiction of DEQ. As a lakeshore recreation area, the Park contains both a public swimming area and a public boat launch, situated side by side on the lakeshore. At all times, the DEQ had actual knowledge of the habitual and continuous use of the public swimming area during the spring, summer and fall months by members of the public, including small children and others with limited swimming abilities.

In late 1995, Portage Township and the DEQ agreed to improve the boat launch area by, *inter alia*, dredging out a channel for the launching and retrieval of boats. The agreement called for the Township to apply to the DEQ for a dredging permit. Such permits, and the safety reviews which accompany them, are administered and controlled by

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1. The trial court refused to allow amendment of the complaint to state a cause of action under the (substantive) due process clause of U.S.Const., Am 14. Under Michigan procedure, on such a motion all facts pleaded are accepted as true. *Ben P. Fyke and Sons v. Gunter Co.*, 390 Mich. 649, 213 N.W.2d 134 (1973).

the DEQ. The permit was to allow removal of spoil material from the lake bottom, creating a channel running outward from the shore for the use of boats. It was agreed that after the issuance of the permit, DEQ personnel would do the actual dredging.

The Township applied for the dredging permit, which was granted on its terms by the DEQ on November 28, 1995. The permit limited the dredging operations to an area 20 feet along the shoreline, extending 70 feet into the lake, and creating a uniform depth of 4 feet, allowing the removal of 138 cubic yards of spoil material from the lake bottom. Thus, the permit allowed the dredgers to create a hole in the bottom of the lake 20 feet wide, 70 feet long, and 4 feet deep. Under Michigan statutes, it was both a civil and a criminal offense to perform any dredging beyond that allowed in the permit.

In February, 1996, the DEQ sent a crew to the lake to perform the dredging work under the permit. However, although the crew chief[2] had the permit in his possession, and actually posted it on the site, the crew chief never actually read the permit. The reason he never read the permit is that he never intended to limit the dredging to the area identified in the permit, even though under Michigan law it was illegal to dredge outside the area identified in the permit. In fact, in accord with DEQ practice, custom and policy, the crew knew in advance that it would pay no attention to the permit's limitations, and would in fact dredge whatever amount of bottom material, over whatever area, that the crew felt appropriate to the project, even though that would require more dredging than was lawful.

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2. Information gained subsequent to the pleadings indicated that the person who posted the permit was not the DEQ crew chief, but a crew member, a distinction without a difference since all dredging personnel were DEQ employees.

During the actual dredging operation at the Park, in and around February, 1996, the DEQ crew intentionally and deliberately removed vast quantities of spoil material from the lake bottom, well beyond the scope of the permit. Bottom material was removed from the lake bottom to create an underwater channel extending 70 feet along the shoreline (not 20 feet, as per the permit), extending 400 feet into the lake (not 70 feet), and with a depth of 8 feet (not 4 feet). Instead of removing 138 cubic yards of spoil material (about 14 truck loads), which was all the permit allowed, the DEQ removed some 4,000 cubic yards of spoil material (about 400 truck loads) from the lake bottom.

By changing the depth of water in the dredged area from 4 feet (per the permit) to 8 feet, the DEQ changed the dredged area from a relatively safe depth to a depth where even adults could not stand on the bottom and reach the surface.

The edge of this dangerous area of deep water was an underwater cliff, or dropoff, where the water depth changed from less than 30 inches to 8 feet, in just a few steps. By increasing the width of the channel from 20 feet (per the permit) to 70 feet, the DEQ then pushed this underwater cliff westward down the shoreline, toward and actually into the adjacent swimming area.

Thus, the enormous and deliberate amount of dredging, grossly beyond the terms of the dredging permit, created a sudden drop-off in the bottom of the lake, in a line running out from shore through the right side of the swimming area. At the drop-off, the water suddenly and without warning went from approximately 30 inches deep to 8 feet deep.

After creating these dangerous conditions through illegal dredging, outside the scope of the permit and outside the permission granted by the Township, the DEQ's only curative

action was to request a study of the area. The purpose of the study was to determine whether the excessive dredging, creating a potentially deadly channel running right through the swimming area, had created any conditions *dangerous to fish*. At no time did the DEQ undertake or request any review or study of any kind to determine whether the DEQ had created a hazard to the lives and safety of *human beings*.

Having concluded that the fish were not endangered by the excess dredging and the deadly drop-off in the swimming area, the DEQ closed its investigation, pursuant to its usual policies and practices, and took no further action with respect to its own illegal conduct in overdredging at the Park. (*Id.*). The DEQ did this knowing full well that its actions in over-dredging the lake were both civil and criminal violations of the dredging statute which the DEQ itself administers.

It did not take long for the deadly trap set by the DEQ to take effect. In July, 1996, two near-fatalities occurred when children wading or swimming at the public swimming area of the park went over the drop-off and into the 8-foot deep channel running through the swimming area. These children were rescued by another swimmer. DEQ was promptly given actual notice of this incident, and of the conditions which caused it, and of the danger posed to swimmers by these conditions, along with an explicit warning that someone would drown in the public swimming area in the Park unless curative measures were taken. Pursuant to its polices, customs and practices, the DEQ did nothing in response to this incident and warning.

Shortly after the near-fatal incident in June, 1996 and in response to learning of it, Township Trustee H. Watts Stamper contacted the DEQ to discuss the incident.[3] Mr. Stamper

3. Another action was filed involving this same incident, against the individuals who actually performed the dredging, in the Mackinac (Cont'd)

asked whether the DEQ would install buoys in the Park, to separate the swimming area from the dredged-out boat launch area. Pursuant to its policies and practices, the DEQ refused to do so.

Upon the refusal of the DEQ to take any curative measures, and without any permit or any safety or compliance review, Township Trustee Stamper then created his own jury-rigged buoy line by stringing empty plastic jugs together along a length of rope. He placed this "milk-jug buoy line" into the water, extending outward from shore near the right edge of the swimming area. The DEQ was aware of these actions shortly after they occurred.

Tragically, the milk-jug buoy line placed by Stamper was so mispositioned that, although purporting to demarcate the safe swimming area of the Park, it actually enclosed — within the area it showed as "safe" — an extensive portion of the dredged area, with its deadly drop-off. These facts were also well known to the DEQ within a short time. Moreover,

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(Cont'd)
County, Michigan, Circuit Court. That case resulted in a verdict against one of the DEQ employees, Mr. Wayne Suida, finding him reckless in a manner which was the proximate cause of the deaths of the Hutchinson family, and awarding plaintiffs compensation of $10,000,000. The trial court then granted a directed verdict, finding that although the state agency may have had duties of safety, the individual agency employees who designed the project and did the work did not, and finding that Mr. Suida's conduct was not a proximate cause of the drowning deaths. That case is on appeal to the Michigan Court of Appeals. Because that case went through full discovery and trial, more facts are known now than were known at the time of the pleading in the Court of Claims. For instance, it is now known that the contact between the Township and the DNR was initiated by Township Superintendant William Brown, not Township Trustee H. Watts Stamper. Plaintiffs' case against the DEQ, however, remains essentially as it was pled, and the parties are precluded from raising matters outside the record in this Petition.

although the milk-jug line was about 100 feet long, the dredged area was some 400 feet long, leaving 300 feet of unmarked channel through the swimming area.

The mispositioned line of floating milk jugs, to the extent noted or given significance by swimmers at all, would and did cause swimmers to believe that the area to the swim-area side of the line was safe for swimmers, when in fact it was not safe, but was extremely likely to cause injury and death by reason of the sudden drop-off from 2-½ feet to 8 feet of water, created by DEQ's illegal over-dredging. At all times, the DEQ had actual knowledge of the over-dredging it had performed, and of the existence of the drop-off within the public swimming area, and had actual knowledge of the danger these conditions posed to swimmers, especially children. At all times, the DEQ also had actual knowledge that there were no lifeguards at the public swimming area in the Park, and no signs or other warnings to alert swimmers to the dangers of the drop-off.

Despite its actual knowledge of these conditions, and pursuant to its usual policies, practices and customs, the DEQ did nothing all summer to alleviate, in any way, the danger it had created.

The DEQ's dredging of an area exceeding the area described in the dredging permit, which DEQ itself had issued, was a civil and criminal violation of the dredging statute. This was well known to the DEQ. Indeed, the DEQ is the Michigan state agency charged to enforce the dredging statute. However, pursuant to its usual practice when its own employees were the statute violators, DEQ did nothing in this instance, either to enforce the statute or to remedy the deadly conditions it had created in the swimming area at the Park. (*Id.*, ¶ 23).

The installation of the milk-jug buoy line without a permit or safety review of any kind was also a civil and criminal violation of Michigan law, including a violation of DEQ's own regulations. The DEQ well knew that this milk jug line, an *ad hoc* measure adopted in response to the deadly condition DEQ itself had created, was illegal, but again did nothing to enforce the law.

Another state agency, the Michigan Department of Public Health, is charged with the duty to inspect public bathing beaches for hazardous conditions, including dropoffs. By statute, major dredging projects must be submitted by the DEQ to the Department of Public Health for safety review before issuance of a permit. However, the DEQ approved this permit for only 138 cubic yards of dredging, a minor permit which does not require MDPH review. DEQ then dredged the project, illegally, and removed material constituting a major dredging project requiring MDPH review — but DEQ never submitted the matter, before or after the actual dredging, to the MDPH. The DEQ not only prevented the MDPH from performing its statutory duty, but completely evaded a safety review by the MDPH. Had that review been conducted, the Department of Public Health would have had no option but to require immediate correction of the drop-off within the swimming area, or to close the beach. Because the DEQ never informed the MDPH of the dropoff it had created, neither of those actions was taken.

From February, 1996 through August, 1996, and even thereafter, the swimming area at the Park did not have a single sign of any kind to warn swimmers of the dangerous underwater cliff through the swimming area created by DEQ's illegal dredging. This lack of signage was itself a violation of the sign regulations adopted by the DEQ. There were no signs because, even with actual knowledge of the danger and the grave injury or death which was likely to result, the DEQ failed to post any signs.

Thus, the stage was set for the tragedy which overwhelmed the Hutchinson family in August, 1996.

On the summer day of August 22, 1996, Katherine Hutchinson and her two daughters, Tiffany Hutchinson and Christie Hutchinson, went swimming at the public swimming area in the Park. During the afternoon, Tiffany and Christie were wading in water approximately 30 inches deep, toward the right side of the swimming area but on the proper (swimming-area) side of the milk-jug buoy line. Katherine Hutchinson observed the children from the shore.

While wading safely in just 2-1/2 feet of water, the two young girls stepped or fell over the edge of the drop-off, into more than eight feet of water. Unable to return to shore, they began to drown.

Tiffany and Christie's peril quickly elicited a reaction from their mother. Katherine Hutchinson ran from the shore into the water in an attempt to rescue her daughters. As Katherine reached the girls, she too went over the edge of the drop-off into the deep water. Katherine, Tiffany and Christie then slid under the water and disappeared from view.

Katherine Hutchinson, Tiffany Hutchinson and Christie Hutchinson each died from drowning at approximately 5:55 p.m. on August 22, 1996. At the time of her death, Katherine Hutchinson was 30 years of age. Christie Hutchinson was just 11 years old. Tiffany Hutchinson was only 9.

Suit was filed against the DEQ under the Michigan Wrongful Death Act, MCLA 600.2922, alleging various counts. In Count I, plaintiff set forth a claim for substantive due process violations of the Michigan constitution. Plaintiff asserted that each action of the DEQ and its employees and

agents, as described above, was in accord with and undertaken pursuant to a policy, custom or practice of the DEQ, including the practice and custom of deliberately dredging more material than is set forth in the permit, the practice and custom of reviewing overdredging cases for wildlife effects rather than effects on human beings, and the custom and practice of taking no curative measures regardless of the risks posed to human beings.

Plaintiff alternatively alleged that the failure to cure these conditions and the failure of the DEQ to enforce the many statutes and regulations it violated as described above was the result of a lack of a DEQ policy, when a policy was clearly needed to protect and safeguard the constitutionally-secured rights, liberties, privileges and immunities of the citizenry including the decedents. Lack of a needed and necessary policy itself constitutes a policy of the DEQ for constitutional analysis.

Therefore, Count I alleged, the DEQ and its agents deprived Katherine, Christie and Tiffany Hutchinson of their lives, through behavior which was shocking to the conscience, without substantive or procedural due process of law, in violation of the Michigan Constitution, and the DEQ is liable for that deprivation.

Defendant answered the complaint, and then moved for summary disposition.[4] As to Count I, defendant argued that (a) substantive due process requires a "special relationship" between defendant and victim, which was allegedly lacking here; and (b) that although governmental immunity is not a defense to a claim brought directly under the state

4. Michigan has one proceeding called "motion for summary disposition" which combines the federal procedures known as motion for judgment on the pleadings, Fed. R. Civ. P. 12(b)(6), *cf.* MCR 2.116(C)(8), and motion for summary judgment, Fed. R. Civ. P. 56, *cf.* MCR 2.116(C)(10).

constitution, no money damages remedy is or should be permitted for a substantive violation of the due process clause of the state constitution.

Plaintiff answered the motion on the merits. Further, in the event the court determined that no action existed under the Michigan state constitution, Plaintiff sought leave to amend the complaint to state a claim under the substantive due process clause of the Fourteenth amendment to the United States Constitution.[5]

At oral argument, the trial Judge took the matter under advisement, and on Sept. 29, 1998 issued a terse opinion which found that no constitutional cause of action existed under the Michigan constitution.

On January 27, 1999, the trial court also denied leave to amend the complaint to assert a claim under the Fourteenth Amendment to the United States Constitution. The resulting order entered February 10, 1999 disposed of all claims against all parties, and was a final judgment appealable of right to the Michigan Court of Appeals, MCR 7.203(A)(1).

Plaintiff timely claimed an appeal of right to the Michigan Court of Appeals. Plaintiff appealed, *inter alia*, the denial of leave to amend to state a claim directly under the United States Constitution's Fourteenth Amendment guarantee of substantive due process.[6]

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5. Under Michigan law, as under federal law, leave to amend pleadings is freely given when justice requires, MCR 2.118(A)(2)(l). *See also*, MCLA 600.2301; MSA 27A.2301; *Waymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

6. Under *Will v Michigan Department of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), a state is not a person, and 42 U.S.C. § 1983 does not apply to Plaintiff Estates' claims against the DEQ, a state agency.

The Court of Appeals issued its opinion on January 12, 2001. The Court of Appeals affirmed the trial court, although on grounds different from those given by the trial court.

As to the constitutional issues, the Court of Appeals disagreed with the trial court, and held that a cause of action does exist for money damages directly under the due process clause of the Michigan Constitution, co-extensive with the same cause of action arising under the due process clause of the Fourteenth Amendment to the United States Constitution. The Court of Appeals also found that plaintiff had pleaded various policies, practices and customs which would be likely to lead to the creation of hazardous and even deadly conditions at boat launches and public swimming beaches.

Inexplicably, however, the Court of Appeals did not take the next logical step and find that such deadly traps, created by policy, practice or custom of the agency, were likely to — and in this case, actually did — deprive citizens of their very lives, thereby working an unconstitutional deprivation of life without due process of law. Rather, the Court of Appeals concluded that the only thing the citizens, including plaintiffs' decedents, were likely to be deprived of was a safe swimming beach. The Court of Appeals then opined that there is no constitutional right to a safe swimming beach, and thus the policies, practices and customs of the DEQ did not work a deprivation of Constitutional magnitude upon plaintiffs' decedents. Completely ignoring the fact that the decedents were deprived of their very lives, the Court of Appeals held that although plaintiff's wife and daughters were killed, they did not suffer a constitutionally-recognized deprivation of any right or interest protected by either the Michigan or the United States Constitutions:

> Even though plaintiff here specifically alleged that the DEQ had a policy or custom of over-dredging, of not warning of over-dredging and not protecting members of the public from this condition,

plaintiff failed to establish how such a practice constitutes a violation of due process. *Plaintiff has not established a constitutional right to swim at a public beach free of hazards caused by over-dredging of boat ramps*. Accordingly, the trial court did not err in granting summary disposition for failure to state a claim.

Because we find that the trial court did not err in granting summary disposition pursuant to MCR 2.116(C)(8), we also find that there was no abuse of discretion in refusing to allow plaintiff to amend the complaint to add language claiming the lack of adequate remedy pursuant to MCR 2.116(I)(5). It would have been futile to grant leave to amend the complaint to add specific language concerning lack of an adequate remedy because the first prong of Justice Boyle's test was not met."[7]

(Court of Appeals Opinion, Jan. 12, 2001, pp. 4-5).[8]

7. The Court defined Justice Boyle's first tier test as follows:

"Justice Boyle's concurring opinion in *Smith* [*v. Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), *aff'd sub nom Will v. Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989)] says that the state's liability for a constitutional claim should be imposed only where the state's actions would, but for the Eleventh Amendment, render the state liable under 42 USC 1983, pursuant to the standard of *Monell v. New York City Dep't of Social Services*, 436 US 658; 98 S. Ct 2018; 56 L. Ed. 2d 611 (1978); *Smith*, *supra* at 642 (Boyle, J.). In *Monell*, the Supreme Court ruled that a local government could be liable under 42 U.S.C .§ 1983 when the performance of an official policy or custom caused a person to be deprived of federal constitutional rights. *Monell*, *supra* at 694." (Court of Appeals Opinion, Jan. 12, 2001, p. 3).

(Cont'd)

Plaintiff-appellant timely moved for rehearing in the Court of Appeals. On March 22, 2001, the Court of Appeals curtly denied the motion in a single sentence: "The Court orders that the motion for rehearing is DENIED."

Plaintiff then sought leave to appeal to the Michigan Supreme Court, which hears appeals only on leave granted.[9] The Michigan Supreme Court denied leave to appeal, without substantive explanation, on April 29, 2002.

Plaintiff now respectfully seeks a writ of certiorari from this Honorable Court. Only the Supreme Court has the power to enforce the United States Constitution on behalf of those injured or killed by state government, in violation of the Fourteenth Amendment, when the state courts have chosen to protect the state's treasury rather than the federal Constitution, their own citizens, and the American system of ordered liberty.

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8. Because the Court of Appeals held that the same standards governed the dismissal of the state constitutional claim and the motion to amend to set forth a federal constitutional claim, this finding disposed of both issues.

9. MCLA 600.309; *see also* MCR 7.301

REASONS FOR GRANTING THE WRIT

I. Where Plaintiffs' Decedents Were Killed By Conduct Of State Government Which Was Shocking To The Conscience, and Criminal, The Holding Of The Michigan Court Of Appeals That Decedents Were Only Deprived Of A Safe Day At The Beach, And Therefore Lost Nothing Protected By The Constitution, Is An Error Of Law Which Reads The Fourteenth Amendment's Guarantee of Substantive Due Process Out Of The United States Constitution, And Conflicts With Relevant Decisions Of The United States Supreme Court.

The Supreme Court has recognized that the Fourteenth Amendment's provision that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law," U.S. Const. Amend. XIV, § 1, "guarantees more than fair process," *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S. Ct. 2258 (1997), and covers a substantive sphere as well, "barring certain government actions regardless of the fairness of the procedures used to implement them," *Daniels v. Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986). The Supreme Court has also stated that in situations where a state actor is afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action, the chosen action will be deemed "conscience shocking" if the action was taken with "deliberate indifference." *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708 (1998).

Plaintiffs' decedents were deprived of their lives through the arbitrary, capricious, illegal and shocking government action detailed in the complaint (Appendix A), under circumstances where the state actors had two years to consider and decide upon their course of action. Nonetheless, the

Michigan Court of Appeals affirmed the denial of leave to amend that complaint to assert a Fourteenth Amendment "substantive due process" claim.

The Court of Appeals did not question whether the DEQ actors had the requisite level of culpability to sustain such a claim, i.e., whether their illegal and deadly behavior was "shocking to the conscience", *Lewis*, *supra*. That phrase is nowhere in the opinion. Instead, the Court of Appeals focused its analysis on the "deprivation" requirement of the Fourteenth Amendment. The Court of Appeals held that plaintiffs were required not only to show that the decedents were killed by governmental conduct shocking to the conscience, but also that they were killed while decedents were engaged in an activity which was itself constitutionally protected. The entire justification offered by the Court of Appeals for dismissal of Petitioners' state constitutional claims, and denial of leave to add a federal constitutional claim, consisted of one paragraph:

> Even though plaintiff here specifically alleged that the DEQ had a policy or custom of over-dredging, of not warning of over-dredging and not protecting members of the public from this condition, plaintiff failed to establish how such a practice constitutes a violation of due process. Plaintiff has not established a constitutional right to swim at a public beach free of hazards caused by over-dredging of boat ramps.

(Michigan Court of Appeals Opinion, p. 4).

An essential element of a due process claim is a deprivation. Citizens shall not be "deprived of life, liberty or property without due process of law."

The Court of Appeals rationale for concluding that plaintiffs had not stated a due process claim, to the extent it is comprehensible at all, is best understood as a finding relating to the deprivation issue. The Court of Appeals is saying that since plaintiffs had no constitutionally-protected liberty interest in swimming at a public beach free of hazards, plaintiffs' decedents could not, a fortiori, have been deprived of any protected interest of constitutional magnitude. Since decedents had no constitutional right to a safe swimming beach, according to the Court of Appeals, taking that safety away through unconscionable government action did not deprive the decedents of anything to which they had a constitutional right.

The poverty of this constitutional analysis is plain on its face. By focusing on the activity plaintiff's decedents were engaged in at the time of their deaths, instead of the deaths themselves, the Michigan Court of Appeals added an element not found in any prior case of this Court or the federal Courts of Appeal. In Michigan, at least, it is now the law that government may kill or injure its citizens, through direct governmental action which is shocking to the conscience; and the citizens are without remedy, as long as they were not engaged in a constitutionally-protected activity at the time their government killed them.

The truly frightening thing about the Court of Appeals analysis is that it is independent of any consideration of the level of culpability of the government actors. The Michigan Court of Appeals statements would apply whether government acted intentionally, or recklessly, or with deliberate indifference. If the DEQ officers had dredged the channel intending that swimmers would fall in and drown, the Court of Appeals opinion would remain the same. If no one has a right to safety, then the manner in which that safety is invaded and destroyed is irrelevant.

The whole point of substantive due process analysis is that there is no principled distinction for liability purposes between an intentional governmental killing, and governmental action not intended to kill but so likely to kill as to be shocking to the conscience. Each kind of government action deprives a citizen of a protected life interest, in violation of the doctrines of substantive due process. *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

Once the government's causative behavior is found "shocking to the conscience", the only remaining requirement for a substantive due process claim is that the victims must suffer a "deprivation" of constitutional magnitude — i.e., life, liberty or property. A person need not have a constitutional interest in the general activity in which he or she is engaged when killed, as the Michigan Court of Appeals implies.

In short, government cannot, through conscience-shocking behavior, kill its citizens with impunity so long as the death takes place while the citizens are engaged in an activity to which they have no independent constitutional right, such as swimming at a public beach. No matter what the specific activity of the government, whether dredging boat channels or any other activity, and no matter what the activity of the citizens, whether swimming at a public beach or some other activity, government simply cannot kill its citizens through conduct which is shocking to the conscience. If government does so, the Fourteenth Amendment provides a remedy.

The Fourteenth Amendment imposes due process limitations on the taking of life or liberty by government. *Lewis*, supra. When plaintiffs show that government conduct, which is shocking to the conscience under the circumstances, has deprived the decedents of life or liberty, they need show nothing further. The "protected constitutional right" is the

life interest in remaining alive, or the liberty interest in being free from personal injury.[10] No additional interest, such as a separate right to swim at a safe beach, is required. Citizens have a right to be free of personal injury or death from unconscionable government conduct, while swimming at a beach and in every other activity of life. When the Michigan Court of Appeals says otherwise, it effectively removes Michigan from the ambit of the Fourteenth Amendment.

Recognition that there is a constitutional right to life, which the government may not take away under any circumstances without due process of law, is so essential to our constitutional freedoms that no authority should be required to establish it. Nonetheless, this fundamental notion was completely ignored by the Michigan Court of Appeals. Citation of a few authorities may therefore be appropriate.

The Justices of the Supreme Court have clearly recognized that a person has an interest in his or her life, to which due process attaches. For instance, in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (1998), Chief Justice Rehnquist, joined by Justices Scalia, Kennedy, and Thomas, recognized in Part II of his opinion that an accused in a capital case has a "life" interest prior to verdict that requires due process to be afforded.[11] Justice O'Connor's concurring opinion, in which

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10. Petitioner Estates focus on "life interests" because the conduct of the Michigan governmental actors killed their decedents. However, a person's liberty interest in his or her bodily integrity and personal security has also received clear recognition from this Court, see for instance *Rochin v. California*, 342 U.S. 165 (1952); *Youngberg v. Romeo*, 457 U.S. 307, 315, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

11. These Justices held that such a "life interest" is extinguished after sentence of death is pronounced, removing due process considerations from state clemency proceedings, circumstances certainly not present in the case at bar.

Justices Souter, Ginsburg, and Breyer joined, was even more firm in recognizing that a person has a "life interest" protected by the constitution:

> A prisoner under a death sentence remains a living person and consequently has an interest in his life. The question this case raises is the issue of what process is constitutionally necessary to protect that interest in the context of Ohio's clemency procedures.

Justice Stevens, concurring in part and dissenting in part, was equally firm on this point:

> The text of the Due Process Clause properly directs our attention to state action that may '***deprive***' a person of ***life***, liberty, or property. When we are evaluating claims that the State has unfairly deprived someone of liberty or property, it is appropriate first to ask whether the state action adversely affected any constitutionally protected interest. Thus, we may conclude, for example, that a prisoner has no 'liberty interest' in the place where he is confined, *Meachum v. Fano*, 427 U.S. 215 (1976), or that an at-will employee has no 'property interest' in his job, *Bishop v. Wood*, 426 U.S. 341 (1976). There is, however, no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does.[12]

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12. *See also*, *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) another death penalty case, holding that a Florida sentencing procedure "does not satisfy the constitutional command that no person shall be ***deprived*** of ***life*** without due process of law."

Indeed, in the criminal context, the Supreme Court has held that deprivation of life, by government, is qualitatively different from a claim for deprivation of liberty or property, and calls for heightened constitutional scrutiny:

> Because a deprivation of liberty is qualitatively different from a deprivation of property, heightened procedural safeguards are a hallmark of Anglo-American criminal jurisprudence. But that jurisprudence has also unequivocally established that a State's deprivation of a person's life is also qualitatively different from any lesser intrusion on liberty.

Spaziano v Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340, 52 U.S.L.W. 5030.

In *City of Oklahoma City v Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791, 53 U.S.L.W. 4639 (1985), a civil damages case involving a police shooting , the Court noted that plaintiff's evidence that her husband had been killed by a government agent "established a deprivation of a constitutional right . . ."[13] [14]

Likewise, in *Collins v City of Harker Heights*, 112 S. Ct. 1061, 117 L. Ed. 2d 261, 60 U.S.L.W. 4182 (1992),

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13. The Court went on to hold that plaintiff had failed to establish that the fatal bullet was fired as a result of a City policy, a problem not presented by the case at bar.

14. Likewise, in *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 117 L. Ed. 2d 261, 60 U.S.L.W. 4182 (1992), the Court found that the failure of the City to train its municipal sewer workers in the hazards of their duties was not "arbitrary and capricious" in the constitutional sense, but never doubted that the loss of life by plaintiff's decedent sufficiently alleged an injury of constitutional magnitude.

while the Court found that the failure of the City to train its municipal sewer workers in the hazards of their duties was not "arbitrary and capricious" in the constitutional sense, the Court never doubted that the loss of life by plaintiff's decedent sufficiently alleged an injury of constitutional magnitude.

In the leading case on substantive due process claims, *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998), the Court noted that:

> Our prior cases have held the provision that '[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law,' U. S. Const., Amend. 14, Section 1, to 'guarante[e] more than fair process,' *Washington v. Glucksberg*, 521 U. S. __, __ (1997) (slip op., at 15), and to cover a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them,' *Daniels v. Williams*, 474 U. S. 327, 331 (1986); *see also Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (noting that substantive due process violations are actionable under Section 1983). The allegation here that Lewis was deprived of his right to life in violation of substantive due process amounts to such a claim . . .

Such cases highlight the extreme illogic of the decision of the Michigan Court of Appeals in the case at bar.

Instead of considering the conscience-shocking behavior of the DEQ, the Court of Appeals looked at the danger that conduct created, and looked to see if the creation of that danger itself deprived decedents of a constitutionally protected activity. The Court of Appeals has decided to apply

the Fourteenth Amendment, at least in Michigan, through the original supposition that state endangerment of its citizens merely deprives the citizens of safety in the specific activity in which they are engaged when harmed. One then looks to the specific activity in which the victims were engaged when killed, and asks whether they had a constitutional right to engage in it. If not, then the deprivation of safety in that activity, regardless of its result, was not a deprivation of constitutional magnitude.

Underlying the entire Court of Appeals analysis is one simple fallacy: that there can be no constitutional right to perform an activity, in safety, unless there is first a constitutional right to perform the activity at all. No matter what dangers the state creates, says the Court of Appeals, and no matter how culpably it creates them, if there is no separate constitutional right to engage in the activity, then the deprivation of safety during the activity can never violate the Fourteenth Amendment.

Inspection of the Court of Appeals Opinion shows that this is precisely the analysis adopted in this case. The Court of Appeals noted the plaintiff's allegations that DEQ policies led directly to a dangerous swimming situation, likely to injure or kill. The Court of Appeals then says that this merely deprived Kathy, Tiffany and Christie Hutchinson of safety at the beach; but there is no constitutional right to safety at the beach, and thus DEQ policy did not deprive plaintiffs of anything to which they were constitutionally entitled. By this reasoning, the Court of Appeals concluded that the state could take the lives of these innocents with no cognizable deprivation and hence no Fourteenth Amendment case.

Such an analysis simply reads substantive due process out of the Constitution. *Any* substantive due process case can be analyzed as: There is no right to perform the activity,

therefore there is no right to safety in performing the activity, therefore there is no substantive due process deprivation. Take *Lewis*, for example. In *Lewis*, the victim was driving on the public street. The Michigan Court of Appeals would say that since there is no constitutional right to drive on the public street, there is no right to do such driving in safety. Therefore, under no circumstances can state action that deprives the plaintiff of that safety in driving amount to a constitutional violation. This is directly contrary, however, to what this Court actually held in *Lewis*, where the Court found that under some circumstances, the government's conduct would be so bad that substantive due process liability would attach. But not in Michigan. In Michigan, substantive due process liability will *never* attach to *any* governmental conduct.[15] The Michigan government can kill its citizens with impunity, regardless of the shocking nature of the governmental conduct, and leave them without redress.

This must not be permitted.

Only the federal courts can protect citizens from their state governments, when those governments decide to protect the state treasury at the sacrifice of established federal constitutional doctrines. This is such a case. The United States Supreme Court should take action to overrule the Michigan Court of Appeals on this important subject. Constitutional protections against abuses of state governmental power can only be eroded if the federal courts refuse to act in the face of clear error below.

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15. That is, except in cases where the citizens are killed by shocking government conduct while engaged in a constitutionally protected activity; voting, for instance.

CONCLUSION

Kathy Hutchinson and her young daughters, Tiffany and Christie, were all killed when an agency of state government, by clearly unlawful conduct shocking to the conscience, created a concealed underwater trap into which they fell and drowned. Gerry Hutchinson lost his entire family.

When Petitioner Estates attempted to pursue a Fourteenth Amendment due process claim, the state courts held that no such claim could possibly exist, regardless of the culpability or shocking nature of the state's conduct, unless at the time their government killed them, the decedents were engaged in an activity which was itself constitutionally protected. Finding that plaintiffs had not established a constitutional right to swim at a safe beach, and choosing to protect the state treasury over both the citizens and the Constitution, the Michigan Court of Appeals held that no Fourteenth Amendment claim was stated by a complaint alleging that government had deprived decedents of their lives through conduct shocking to the conscience. Avoiding a case which would of necessity compel it to expose the state treasury to a claim for damages, the Michigan Supreme Court denied discretionary review. This Court is the only court that remains.

To correct the legal construction of the Michigan Court of Appeals, and prevent the Michigan Courts from doing away with all substantive due process protections for the state's citizens, this Court is respectfully asked to either

(A) Grant a writ of certiorari to the Michigan Court of Appeals; or, in the alternative

(B) Provide a summary ruling on the issue pursuant to Supreme Court Rule 16.1.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE STATE OF MICHIGAN COURT OF APPEALS DATED JANUARY 12, 2001

STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
January 12, 2001

No. 217774
Court of Claims
LC No. 98-017020-CM

GERALD HUTCHINSON, Personal Representative of the Estate of KATHERINE HUTCHINSON, the Estate of CHRISTINE HUTCHINSON, and the estate of TIFFANY HUTCHINSON,

Plaintiff-Appellant,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY, f/k/a DEPARTMENT OF NATURAL RESOURCES,

Defendant-Appellee.

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Appendix A

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(8) and (C)(10). Plaintiff also challenges the trial court's refusal to allow the filing of a second amended complaint to allege a trespass-nuisance theory of recovery. We affirm.

I.

Facts and Proceedings

This action arose out of the drowning deaths of plaintiff's wife and two daughters at a park on an inland lake owned by the state, but leased to a township. Evidence showed that the shoreline of the lake had been used by swimmers for many years and was referred to as "the swimming area." On November 28, 1995, the Department of Environmental Quality ("DEQ") issued a dredging permit to the township for the improvement of the existing Department of Natural Resources ("DNR") boat launch. The permit allowed the removal of 138 cubic yards from an area 25' by 75' and to a depth of four feet.

The area was dredged by the DEQ and, on February 26, 1996, a DEQ employee informed the department's area park manager that, rather than dredge the area as specified in the permit, an area 75' by 400' had been dredged to a depth of eight feet with a total of 4,000 cubic yards of lake bottom removed. The DEQ determined that the over-dredging had not damaged fish habitat and the matter was not pursued. The DEQ did not notify the township of the over-dredging.

Appendix A

Two weeks before the Hutchinsons drowned, a child nearly drowned near the boat launch. The township erected a milk-jug buoy line to keep swimmers away from the area, but the line was incorrectly positioned with the drop off within the marked swimming area. Plaintiff's wife drowned while attempting to rescue her children. Divers located the Hutchinsons more than an hour after being summoned to the scene.

Plaintiff, as personal representative, filed a multiple count complaint in the Court of Claims against the DEQ and four individual DEQ employees.[1] Count I of the complaint alleged that the over-dredging was done pursuant to department policy or custom in violation of the due process clause of the Michigan Constitution. Count II alleged gross negligence against the individual state employees. Count III sought to hold the DEQ liable for the acts of the township under a joint venture theory. The remaining counts alleged liability under the Recreational Land Use Act, the Consumer Protection Act and a third-party beneficiary theory.

Defendant moved for summary disposition under MCR 2.116(C)(4), (C)(7), (C)(8) and (C)(10). Defendant argued, in part, that, even if Michigan did recognize an exception to governmental immunity for constitutional claims, plaintiff failed to plead facts showing that the DEQ had a custom or policy mandating the unconstitutional conduct

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1. Plaintiff also filed a circuit court action against the township and six individuals employed by the township or the DEQ. This Court denied leave to file an interlocutory appeal of the trial court's denial of four individual defendants' motion for partial summary disposition. The outcome of that action is unknown.

of its employees and that, even if the DEQ had such a policy, it was not unconstitutional. Moreover, defendant claimed that plaintiff had an adequate remedy against the individual defendants for gross negligence and, therefore, could not assert a claim under the constitution. Plaintiff responded that the DEQ's policy of over-dredging in violation of permits was evidenced by a DEQ employee's statement that he had not read the permit before beginning the dredging operation. Plaintiff also referenced the DEQ memorandum regarding the potential harm to fish habitat caused by the dredging and the near drowning that occurred earlier. The trial court agreed with defendant and granted summary disposition under MCR 2.116(C)(8).

The DEQ denied the existence of a joint venture between the state and the township because there was no profit motive for maintaining the public beach or boat launch. Plaintiff conceded that there was no written lease or permit evidencing the joint venture, but argued that the DEQ and the township benefited from the venture because it furthered their obligations to provide recreational facilities for their citizens. The trial court disagreed and ruled that, absent a profit motive or a motive to benefit themselves, there was no joint venture. The trial court granted summary disposition on count III under MCR 2.116(C)(8) and (C)(10). The court also dismissed the individual defendants, as well as plaintiff's claim under the Recreational Use Act.

On motion for reconsideration, the court also granted summary disposition of the gross negligence claim reasoning that a state agency cannot be held vicariously liable for the gross negligence of its employees. Thereafter, plaintiff filed

a first amended complaint developing the gross negligence argument, to which defendant filed a motion for summary disposition arguing that the matter had already been decided by the court. Plaintiff also sought leave to file a second amended complaint to allege a trespass-nuisance claim and violations of the due process clause of the United States Constitution.

The trial court denied leave to add the federal constitutional claim. The court also denied leave to add the trespass-nuisance claim on its finding that the narrow exception to governmental immunity must fall within the parameters of an historically-recognized cause of action. The trial court ruled that a trespass-nuisance claim required an invasion of private property, which had not occurred here. The court denied plaintiff's motion for leave to add the trespass-nuisance claim because the amendment would have been futile.[2]

II.

Standard of Review

This Court reviews a motion for summary disposition for legal error. *Spiek v. Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Dismissal pursuant to MCR 2.116(C)(8) is appropriate when a party has failed to state a claim on which relief can be granted. *Radtke v. Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). A motion under

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2. The parties stipulated to dismiss the breach of contract claim and therefore, the court's order is a final order for appeal purposes.

Appendix A

MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; all factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Maiden v. Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Kuhn v. Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.* at 324.

A motion pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Spiek*, *supra* at 337. The motion may be granted pursuant to MCR 2.116(C)(10) when, except as to damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Ireland v. Edwards*, 230 Mich App 607, 613; 584 NW2d 632 (1998). The trial court must consider the documentary evidence submitted by the parties, and giving the benefit of any reasonable doubt to the nonmoving party, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Id.*

Appendix A

III.

Analysis

A.

Constitutional Tort

Governmental immunity is no defense when a plaintiff alleges that by policy or custom, the state has violated a right conferred by our state constitution. *Smith v. Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd. sub nom *Will v. Michigan Dep't of State Police*, 491 U.S. 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). The Court further held that a "claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Id. Smith* is considered to have recognized a narrow remedy against the state where plaintiff would otherwise be left with no remedy. *Jones v. Powell*, 227 Mich App 662, 670; 577 NW2d 130 (1998), aff'd. 462 Mich 329; 612 NW2d 423 (2000).

Justice Boyle's concurring opinion in *Smith* says that the state's liability for a constitutional claim should be imposed only where the state's actions would, but for the Eleventh Amendment, render the state liable under 42 USC 1983, pursuant to the standard of *Monell v. New York City Dep't of Social Services*, 436 U.S. 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978); *Smith, supra* at 642 (Boyle, J.). In *Monell*, the Supreme Court ruled that a local government could be liable under 42 USC 1983 when the performance of an official policy or custom caused a person to be deprived of federal

constitutional rights. *Monell*, *supra* at 694. This Court has adopted Justice Boyle's methodology in *Reid v. Dep't of Corrections*, 239 Mich App 621; 609 NW2d 215 (2000); *Jones*, *supra*, 227 Mich App 671; *Cremonte v. Michigan State Police*, 232 Mich App 240, 250-251; 591 NW2d 261 (1998); *Carlton v. Dep't of Corrections*, 215 Mich App 490, 504-505; 546 NW2d 671 (1996).

Using this analysis, the state may be liable for a constitutional tort only when the execution of an official policy or custom caused a person to be deprived of constitutional rights. *Carlton*, *supra* at 505. Therefore, the state may be held liable for a violation of the state constitution only where a state policy or custom mandated an official's or employee's actions. *Reid*, *supra* at 621; *Carlton*, *supra* at 505. This Court has consistently ruled that a plaintiff has no constitutional tort claim if he has an alternative remedy, such as an action under the civil rights act. *Jones*, *supra* at 670-671; *77th Dist Judge v. Michigan*, 175 Mich App 681, 696; 438 NW2d 333 (1989).

For example, in *Marlin v. Detroit (After Remand)*, 205 Mich App 335, 338; 517 NW2d 305 (1994), the plaintiff claimed that the defendant city had a custom or policy of holding the personal effects of deceased crime victims without attempting to locate the next of kin. The Court held that there had been no due process violation even if the city had a custom or policy, because the plaintiff could not establish the policy deprived her of her property. Because the first tier of Justice Boyle's test had not been met, the plaintiff failed to state a claim for damages based on a violation of the state constitution.

Even though plaintiff here specifically alleged that the DEQ had a policy or custom of over-dredging, of not warning of over-dredging and not protecting members of the public from this condition, plaintiff failed to establish how such a practice constitutes a violation of due process. Plaintiff has not established a constitutional right to swim at a public beach free of hazards caused by over-dredging of boat ramps. Accordingly, the trial court did not err in granting summary disposition for failure to state a claim.

Because we find that the trial court did not err in granting summary disposition pursuant to MCR 2.116(C)(8), we also find that there was no abuse of discretion in refusing to allow plaintiff to amend the complaint to add language claiming the lack of adequate remedy pursuant to MCR 2.116(I)(5). It would have been futile to grant leave to amend the complaint to add specific language concerning lack of an adequate remedy because the first prong of Justice Boyle's test was not met.

B.

Trespass Nuisance

Plaintiff avers that the trial court erred in disallowing the filing of a second amended complaint to add a trespass-nuisance claim. A trial court's decision regarding a motion to amend pleadings is reviewed for an abuse of discretion. *Weymers v. Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Leave to amend pleadings should be freely given when justice so requires. MCR 2.118(A)(2); *Ben P Fyke & Sons v. Gunter Co*, 390 Mich 649, 656; 213 NW2d 134

(1973). We conclude that the trial court did not abuse its discretion in denying plaintiff's motion to amend his complaint to add a trespass-nuisance claim because here there is no trespass by the government on another's land.

Under the governmental immunity act, governmental agencies are immune from tort liability when engaged in the exercise or discharge of a governmental function. MCL 691.1401 *et seq.*; MSA 3.996(101) *et seq.* The statute has been characterized as providing a broad grant of immunity with narrow statutory and common-law exceptions. *Hadfield v. Oakland Co Drain Comm'r*, 430 Mich 139, 146-148; 422 NW2d 205 (1988); *Dampier v. Wayne Co*, 233 Mich App 714, 729; 592 NW2d 809 (1999).

Michigan recognizes a trespass-nuisance exception to the immunity statute because such a cause of action existed before July 1, 1965, the effective date of the act. *Continental Paper & Supply Co, Inc v. Detroit*, 451 Mich 162, 164; 545 NW2d 657 (1996); *Hadfield*, *supra* at 145, 205, 209, 213. A trespass-nuisance is a trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and results in personal or property damage. *CS & P, Inc v. Midland*, 229 Mich App 141, 145; 580 NW2d 468 (1998). To establish trespass-nuisance, a plaintiff must show: (1) a condition constituting a nuisance or trespass, (2) cause, being the physical intrusion, and (3) causation or control by the state or local government. *Continental Paper*, *supra* at 164; *Cloverleaf Car Co v. Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995). The party raising a claim of trespass-nuisance need not be the owner or tenant

of the property invaded. *Herro v. Chippewa Co Rd Comm'rs*, 368 Mich 263, 265; 118 NW2d 271 (1962); *Bronson v. Oscoda Twp*, 188 Mich App 679, 682-683; 470 NW2d 688 (1991).

In *Veeneman v. Michigan*, 430 Mich 139, 192; 422 NW2d 205 (1988), one of the cases consolidated with *Hadfield*, the plaintiff's son was killed while riding a dune buggy in a state park. *Id.* at 192. The plaintiff alleged that the state had committed a nuisance by failing to regulate the operation of ORVs used in the park, failing to provide adequate medical provisions and failing to inspect the ORVs when the state was aware of previous deaths and injuries. *Id.* at 193. The Supreme Court ruled that the plaintiff's action did not fall within the trespass-nuisance exception to governmental immunity since there were no allegations of trespass. *Id.* at 194-195. The import of the ruling is that the government cannot commit a trespass-nuisance on its own land. Instead, it is when a noxious force put into play by the state enters or affects the property of another that the cause of action arises.

Further in *Bronson*, *supra* at 681, the plaintiff became paralyzed when, while diving in Lake Huron, he struck a sandbar. The plaintiff sued the township claiming that its placement of the pier had created the sandbar and that the sandbar was a nuisance. *Id.* This Court, citing *Hadfield*, ruled that the plaintiff's action could not be sustained because it involved no interference or invasions onto private land. *Id.* at 683. The panel reasoned that both *Hadfield* and *Herro* mandated that a trespass-nuisance claimed be based on an interference of private land. *Id.* at 683. This Court noted that because the bottomland of Lake Huron belongs to the state, there could be no trespass-nuisance claim. *Id.* at 683 n 4.

Appendix A

Under the reasoning of *Veeneman* and *Bronson*, the trial court did not err in granting summary disposition of plaintiff's trespass-nuisance claim because there was no trespass of private property. Plaintiff ignores that there is only one parcel of land involved here, instead of two. Merely because the DEQ agreed to dredge a portion of the property does not create two different parcels for the purposes of trespass-nuisance. Like the *Veeneman* case, there was no trespass and all the property involved was public. While plaintiff argues that, pursuant to the lease between the township and the DEQ, the DEQ went beyond its permission to be on the land this argument ignores that a single parcel of land is at issue here.

C.

Joint Venture

Plaintiff claims that the trial court erred in ruling that the DEQ and the township were not joint venturers. While the trial court erred in its reasoning for granting summary disposition of plaintiff's joint venture claim, the court's ruling is affirmed because there is no question of fact that an element of a joint venture — a community interest and control over the subject matter of the enterprise — is lacking.

A joint venture is an association to carry out a single business enterprise for a profit and is governed by the rules of partnerships. *Brewer v. Stoddar*, 309 Mich 119, 128; 14 NW2d 804 (1944); *Gleichman v. Famous Players-Lasky Corp*, 241 Mich 266, 270-271; 217 NW 43 (1928). To constitute a joint venture, the parties must contribute to a common undertaking and have some control over the

subject matter or property right of contract. *Reed & Noyce, Inc v. Municipal Contractors, Inc*, 106 Mich App 113, 117; 308 NW2d 445 (1981). It is fundamental that one member of a joint venture can be bound by the actions of the other member. *Davidson v. State*, 42 Mich App 80, 84; 201 NW2d 296 (1972). A joint venture has six elements:

> (a) an agreement indicating an intention to undertake a joint venture,
>
> (b) a joint undertaking of,
>
> (c) a single project for profit,
>
> (d) a sharing of profits as well as losses,
>
> (e) contribution of skills or property by the parties,
>
> (f) community interest and control over the subject matter of the enterprise. [*Berger v. Mead*, 127 Mich App 209, 215; 338 NW2d 919 (1983).]

This Court has ruled that governmental bodies may enter into joint ventures despite the absence of a profit motive. *Berger, supra* at 216-217; *Beattie v. East China Charter Twp*, 157 Mich App 27, 29; 403 NW2d 490 (1987). Therefore, the trial court erred in ruling that an absence of profit motive barred a joint venture between units of government.

Appendix A

However, summary disposition of plaintiff's claim is affirmed because there is no genuine issue of fact that the township had no control over the dredging project. Therefore, there was no joint venture with regard to the dredging. See *Meyers v. Robb*, 82 Mich App 549, 557; 267 NW2d 450 (1978). According to township official Stamper, DEQ did all the dredging and the township had no knowledge that the dredging went beyond the permit limit until after the Hutchinsons' deaths.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

APPENDIX B — ORDER OF THE STATE OF MICHIGAN COURT OF CLAIMS DENYING PLAINTIFF'S MOTION TO FILE SECOND AMENDED COMPLAINT AND GRANTING SUMMARY DISPOSITION TO DEFENDANT DATED FEBRUARY 10, 1999

STATE OF MICHIGAN

COURT OF CLAIMS

Case No. 98-17020-CM
Hon. Carolyn Stell

ESTATE OF KATHERINE HUTCHINSON,
ESTATE OF CHRISTIE HUTCHINSON, and
ESTATE OF TIFFANY HUTCHINSON,
all by GERALD HUTCHINSON,
PERSONAL REPRESENTATIVE,

Plaintiff,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY f/k/a DEPARTMENT OF NATURAL RESOURCES, a Michigan state governmental agency,

Defendant.

Appendix B

ORDER DENYING PLAINTIFF'S MOTION TO FILE SECOND AMENDED COMPLAINT AND GRANTING SUMMARY DISPOSITION TO DEFENDANT

At a session of said Court, held in the City of Lansing, Ingham County, Michigan, this 10th day of February, 1999.

PRESENT: HONORABLE CAROLYN STELL

This matter having come before the Court on plaintiff's motion to file a second amended complaint, briefs having been filed, oral argument heard and the Court being otherwise fully advised;

It is ordered that plaintiff's motion to file a second amended complaint is denied for the reasons set forth on the record.

Further, plaintiff having abandoned his third-party beneficiary contract claim, summary disposition is granted to defendant and plaintiff's complaint and first amended complaint are dismissed in their entirety and with prejudice.

This is a final order as that term is defined by MCR 7.202(8)(a).

s/ Carolyn Stell
Hon. Carolyn Stell
Court of Claims Judge

APPENDIX C — ORDER OF THE STATE OF MICHIGAN COURT OF CLAIMS GRANTING SUMMARY DISPOSITION DATED SEPTEMBER 29, 1998

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

File No. 98-17020-CM

Judge Ball for Judge Stell

ESTATE OF KATHERINE HUTCHINSON, *et al*,

Plaintiffs,

vs

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, *et al*,

Defendants.

ORDER GRANTING SUMMARY DISPOSITION

At a session of said Court held in the Circuit Courtrooms, City of Lansing, Ingham County, MI this 29th day of September, 1998:

Present: Honorable Richard D. Ball, Acting Circuit Judge

Appendix C

Counsel of record appeared before the Court September 16, 1998, and presented oral argument in connection with defendant's Motion for Summary Disposition.

Count I of plaintiffs' complaint alleges that defendants committed a constitutional tort and that defendants violated plaintiffs' due process rights under Article 1, Section 17 of Michigan's Constitution.

This Court is satisfied that there is no legal authority to support the cause of action set forth in Count I. See *Smith v Department of Public Health*, 428 Mich 540 (1987); *77th District Judge v Michigan*, 175 Mich App 681 (1989); and *Burdette v Michigan*, 166 Mich App 406 (1988). While various members of the Michigan Supreme Court, in *Smith*, did not foreclose the possibility of such a cause of action, at most the various opinions left the door open should the right set of facts be presented. Defendants' motion for summary disposition as to Count I is granted per MCR 2.116(C)(8).

Count II sets forth a cause of action against the Department of Environmental Quality based on the gross negligence of its employees. Gross negligence is defined in the governmental immunity statute as ". . . conduct so reckless as to demonstrate a substantial lack of concern whether an injury results." MCLA 691.1407(2)(c).

Gross negligence provides an exception to government immunity. MCLA 691.1407(c). A state governmental agency can be held vicariously liable for the gross negligence of its employee. *Ross v Consumers Power*, 420 Mich 567, 621 *ff* (1984); MCLA 691.1407(c). Count II of plaintiffs' complaint

alleges gross negligence on the part of DEQ employees and in this Court's opinion it sets forth facts upon which a jury could base a factual finding of gross negligence.

Clearly this Court of Claims has no jurisdiction relative to the individual defendants. MCLA 600.6419; *Lowery v Dept of Corrections*, 146 Mich App 342, 348-349 (1985).

Accordingly, defendants' motion for summary disposition relative to Count II is denied as to the governmental agency defendants, and granted as to the individual defendants per MCR 2.116(C)(1).

After conclusion of oral argument, the Court granted defendants' motion for summary disposition as to Count III of the complaint, on the basis two governmental units could not engage in a joint venture because there was no profit objective. Further, the Court granted defendants' motion for summary disposition as to Count V, a Consumer Protection Act claim, inasmuch as in the Court's opinion that Act did not regulate the activities of a governmental agency. The motion was therefore granted per MCR 2.116(C)(8) and (10).

Plaintiffs concede defendant governmental agencies are immune from liability under the Recreational Use Act, and accordingly defendants' motion for summary disposition is granted as to Count V per MCR 2.116(C)(8).

Count VI of the complaint alleges liability on the part of the defendant governmental agencies based on a third party contract beneficiary theory. The allegations in the complaint, and the allegations set forth in Count VI, do not identify the "contract" allegedly breached. During oral argument,

in response to assertions by defendants' attorney that the "contract" was the lease agreement between the township and DEQ, the Court understood counsel for plaintiffs to argue that that was not necessarily the contract giving rise to liability, that there may have been an oral contract or some other "contract" with respect to which plaintiffs' decedents were third party beneficiaries.

Since this cause of action is not an allegation of negligence, defendants are not immune from liability for breach of a contract if decedents were third party beneficiaries. However, the pleadings do not clearly which contract plaintiffs allege was breached, whether the contract, if there was one, was supported by consideration, and what damages arose (tort damages would not be available) from the breach, if any.

Each party cites *Koenig v South Haven*, 221 Mich App 711 (1997), in support of its position relative to Count VI. The Court's reading of that opinion leads it to conclude that the cause of action is available to plaintiffs if properly pleaded. With respect to Count VI, and consistent with the provisions of MCR 2.116(1)(5), plaintiffs may amend Count VI within 21 days of the date of this order.

s/ Richard D. Ball
Richard D. Ball P-26513
District Judge

Countersigned:

s/ [illegible]
Deputy Clerk

APPENDIX D — ORDER OF THE STATE OF MICHIGAN COURT OF APPEALS DENYING PETITION FOR REHEARING DATED MARCH 22, 2001

Court of Appeals, State of Michigan

ORDER

Henry William Saad
Presiding Judge

Joel P. Hoekstra

Jane E. Markey
Judges

Est of Katherine Hutchinson v Dept of Environmental Quality

Docket No. 217774

LC No. 98-017020 CM

The Court orders that the motion for rehearing is DENIED.

s/ Henry William Saad
Presiding Judge

APPENDIX E — ORDER OF THE MICHIGAN SUPREME COURT, LANSING, MICHIGAN DATED APRIL 29, 2002

ORDER

Michigan Supreme Court
Lansing, Michigan

Entered: April 29, 2002

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SC: 119012
COA: 217774
Ct of Claims: 98-017020 CM

ESTATE OF KATHERINE HUTCHINSON,
ESTATE OF CHRISTIE HUTCHINSON, and
ESTATE OF TIFFANY HUTCHINSON,
all by GERALD HUTCHINSON, Personal Representative,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, f/k/a DEPARTMENT OF NATURAL RESOURCES, a Michigan State Governmental Agency,

Defendant-Appellee.

Appendix E

On order of the Court, the application for leave to appeal from the January 12, 2001, decision of the Court of Appeals, is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

APPENDIX F — CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.